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August 18, 1997

VIA COURIER

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

**Re: Hyperion Telecommunications, Inc.'s Petition Requesting Forbearance
(CCB/CPD No. 96-3, CCB/CPD No. 96-7, CC Docket No. 97-146)**

Dear Mr. Caton:

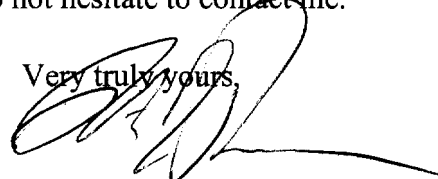
On behalf of WinStar Communications, Inc., this letter shall serve as its Comments in response to the Commission's June 19, 1997 Notice of Proposed Rulemaking in the above proceeding.

On May 23, 1996, WinStar filed Comments in CCB/CPD No. 96-3 supporting permissive detariffing for Competitive Access Providers and opposing mandatory detariffing. WinStar incorporates these Comments herein by reference in opposition to the Commission's instant rulemaking proposal. A copy of these Comments are attached.

An original and 12 copies of this filing and WinStar's May 23, 1996 Comments are enclosed. Please date stamp the extra copy of this letter and return it to the undersigned via my courier.

If you should have any questions, please do not hesitate to contact me.

Very truly yours,



Morton J. Posner

Counsel for WinStar Communications, Inc.

Enclosures

cc(w/encl.): Service List
Competitive Pricing Division (2 copies)
ITS
Timothy Graham
Robert G. Berger, Esq.

No. of Copies rec'd
List ABCDE

012

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May 23, 1996

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VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

**Re: Petition of Hyperion Telecommunications, Inc. for Forbearance From Tariff
Filing Requirements for Competitive Access Providers, DA 96-462**

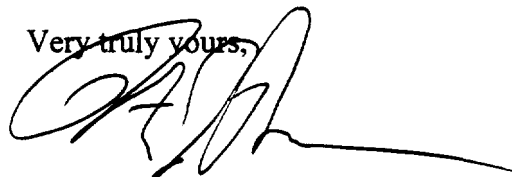
Dear Mr. Caton:

Transmitted herewith on behalf of WinStar Communications, Inc., are an original and six (6) copies of its Comments in the above-referenced proceeding.

Also enclosed is an extra copy of this letter and Comments. Please date-stamp the extra copy and return it to me in the envelope provided.

If there are any questions concerning this matter, please contact me.

Very truly yours,



Morton J. Posner

Enclosures

cc (w/o encl.): Andrew D. Lipman, Esq.

cc (w/encl.): Chief, Tariff Division (2 copies by hand)
ITS (1 copy by hand)
Timothy R. Graham
Robert G. Berger
Joseph M. Sandri, Jr.

161086.1

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

| | | |
|--|---|-----------|
| In the Matter of |) | |
| |) | |
| Petition of Hyperion Telecommunications, |) | DA 96-462 |
| Inc. for Forbearance from Tariff Filing |) | |
| Requirements for Competitive Access |) | |
| Providers |) | |

COMMENTS OF WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"), by its undersigned counsel, hereby submits its Comments in response to the Petition of Hyperion Telecommunications, Inc. for Forbearance from Tariff Filing Requirements for Competitive Access Providers ("CAPs").^{1/} WinStar supports Hyperion's petition and urges the Commission to adopt a policy of permissive tariffing for CAPs.

I. INTRODUCTION

The Commission recently sought comment in a *Notice of Proposed Rulemaking* on its proposal to require mandatory forbearance from tariff filing requirements for non-dominant interexchange carriers ("IXCs").^{2/} WinStar filed comments in that proceeding supporting a policy

^{1/} WinStar is a publicly-held company whose stock is traded on the NASDAQ market system. The Company provides local telecommunications services on a point-to-point basis using wireless, digital millimeter wave capacity in the 38 GHz band, a configuration referred to by WinStar as Wireless FiberSM. The Company's local telecommunications services are offered in 43 of the nation's largest metropolitan statistical areas. WinStar has received authority to operate as a competitive access provider in 22 states and has applications pending in a number of other states. WinStar has also been approved to offer competitive local exchange services in nine states, with applications pending in four other states.

^{2/} *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, FCC 96-123 (released Mar. 25, 1996) ("Forbearance Rulemaking").

of voluntary compliance with tariff filing requirements or "permissive tariffing."^{3/} Permissive tariffing would enable carriers to determine, based upon their customers, and market conditions, whether to file tariffs and, if tariffs are filed, the information contained therein. While the policy considerations underlying tariff forbearance for CAPs and non-dominant IXC's are slightly different, WinStar supports a similar permissive tariffing regime and incorporates its comments from the Forbearance Rulemaking herein. Specifically, WinStar believes permissive tariffing for CAPs is warranted because:

- The sophisticated parties, primarily business and governmental users as well as other carriers, who use CAP service, and the nature of that service, do not require full-blown tariffs to ensure against monopoly or anticompetitive pricing.
- A permissive tariffing policy would allow CAPs to develop a more efficient means of contracting with customers.
- Complete elimination of tariff filings is not authorized by the Telecommunications Act of 1996, is not in the public interest, and is premature.

I. A MANDATORY TARIFF REGIME IS UNNECESSARY FOR NON-DOMINANT COMPETITIVE ACCESS PROVIDERS

Section 10(a) of the Telecommunications Act of 1996^{4/} states that the Commission "shall forbear from applying any regulation or provision" of the Communications Act of 1934 (including the tariff filing requirements set forth in Section 203 of the Communications Act) if the Commission determines: (i) enforcement is not necessary to ensure that common carrier practices are not unjust and unreasonably discriminatory; (ii) it is not necessary for the protection of consumers; and (iii) forbearance is consistent with the public interest. Given the type of

^{3/} See *Comments of WinStar Communications, Inc.*, CC Docket No. 96-61 (April 25, 1996).

^{4/} Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996) ("1996 Act").

customers who demand CAP service, WinStar submits that under this statutory test elimination of mandatory tariff filings is warranted.

Competitive access providers such as WinStar provide dedicated services to sophisticated business customers (or other carriers) who are aware that there are many alternative providers and who execute individual service contracts with a CAP. CAPs offer this service in direct competition primarily with incumbent local exchange carriers ("ILECs") who dominate the market.

Since CAP service is provided either to sophisticated high volume business customers or to other carriers, tariffs do not serve the consumer protection role that normally is associated with interexchange or other telecommunications services alone. New entrants like WinStar do not have sufficient market power to warrant tariff filings to prevent the monopoly or anticompetitive pricing of their services. WinStar does suggest, however, that the Commission continue to require dominant ILECs, who can exert market power in the absence of competition, to offer local access services pursuant to tariff.

II. PERMISSIVE TARIFFING WOULD OFFER PUBLIC INTEREST BENEFITS.

Unlike interexchange service, which is offered to a mass market, CAP service is utilized by a relatively narrow base of customers. However, as non-dominant CAPs grow and expand the geographic scope of their service offerings, tariffs may provide a more efficient mechanism for dealing with a variety of customers by instituting standard contract provisions. Tariffs are a rapid and efficient way for a carrier to adjust services and prices for all present and potential switched access customers at the same time. Tariffs also would enable CAPs to initiate new products and

services quickly without marketing and negotiating individually with customers. By allowing carriers voluntarily to comply with tariff filing requirements, carriers will be able to mix tariff and contract methods to capture the efficiencies of each. Through experimentation, carriers will discover what minimum tariff information the public interest requires. Permissive tariffing would substantially reduce administrative burdens on both the Commission and carriers. Elimination of the cost of filing full blown tariffs would benefit customers in the form of lower prices for service.

III. COMPLETE ELIMINATION OF TARIFF FILINGS IS NOT AUTHORIZED BY THE 1996 ACT, NOT IN THE PUBLIC INTEREST, AND IS PREMATURE

WinStar respectfully suggests that mandatory detariffing currently is not in the public interest, the Commission must not *require* CAPs to withdraw their tariffs. As WinStar argued in its Comments in the IXC docket, the 1996 Act does not mandate elimination of all tariff filing requirements.^{5/} Rather, the 1996 Act only authorizes forbearance consistent with the public interest. Tariffs continue to protect carriers, consumers, and competition alike. In the absence of tariffs, the introduction of varied services and price changes might have to be renegotiated with all customers. It would be impossible to respond quickly to market changes. If CAPs were required to cancel their tariffs, those individual customer service contracts which rely upon tariff language would be eviscerated. There would be uncertainty about what terms and prices govern service without the referenced tariffs, and the possibility that CAPs would be unable to collect from customers as a result. The Commission's complaint procedures would be rendered all the more difficult without the proof that tariffs can provide. Moreover, a mandatory detariffing

^{5/} See *Comments of WinStar Communications, Inc.*, CC Docket No. 96-61, at 3-4.

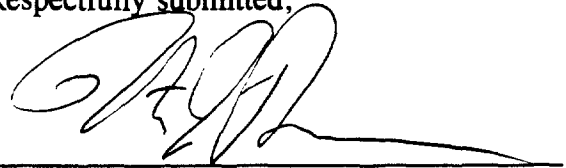
policy would be premature until full local competition exists and the Commission has the benefit of experience in the interaction between the 1996 Act and competition in the local marketplace. Until such time as the Commission, the industry, and consumers gain that experience, a permissive tariffing regime would best serve the public interest.

IV. CONCLUSION

WinStar agrees with the underlying thesis of Hyperion's petition: mandatory tariff filings are no longer necessary for non-dominant CAPs. The public interest is served by a policy of permissive tariffing, which affords carriers the benefits of filing tariffs with the flexibility to tailor an efficient method of contracting with customers. Competition requires, however, that ILECs continue to file tariffs for their CAP service so that the Commission and the industry can monitor instances of anticompetitive ILEC conduct. Complete detariffing of non-dominant CAP service is neither authorized by the 1996 Act nor beneficial to customers, carriers, or the Commission.

Accordingly, WinStar submits that Hyperion's petition should be granted to the extent that the Commission allows permissive tariffing for non-dominant CAPs.

Respectfully submitted,



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Dated: May 23, 1996

CERTIFICATE OF SERVICE

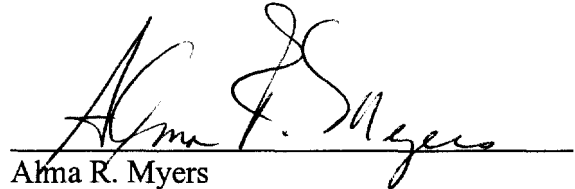
I, Alma Myers, hereby certify that on this 18th day of August, 1997, a copy of the foregoing Comments of WinStar Communications, Inc. was served via courier on the following:

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ITS
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Competitive Pricing Division (2 copies)
Common Carrier Division
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And a copy was served via first class, postage-prepaid mail on the individuals on the attached list.


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